

Syllabus.

be in bad faith towards existing creditors, as, clearly, it was out of all proportion to the means of the husband, considering his state and condition, and seriously impairs his ability to respond to the demands of his creditors.

It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata*.*

We have considered the contract in this case as if it were executed, because no point is made by the respondents that it is executory, and the case has been argued by both sides on the theory that the law applicable to an executed contract of this sort applied to the one in controversy. It may well be doubted whether in any case a mere promise by the husband, without consideration, to pay money to the wife at a future time, can be enforced against the claims of creditors.

DECREE AFFIRMED.

PACIFIC RAILROAD COMPANY v. MAGUIRE.

1. The twelfth section of the act of the Missouri legislature, passed December 25th, 1852, by which it was declared that—

“The Pacific Railroad shall be exempt from taxation until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of such completed road, shall be subject to taxation at the actual cash value thereof :

“*Provided*, That if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said tax—”

created a contract that, subject to the proviso, the railroad should not be taxed.

* Magawley's Trust, 5 De Gex & Smales, 1; Richardson v. Smallwood, Jacob, 552-558; Savage v. Murphy, 34 New York, 508; Iley v. Niswanger, Harper's Equity, 295; Robinson v. Stewart, 10 New York (6 Selden), 189; Thompson v. Dougherty, 12 Sergeant & Rawle, 448, 455, 458; Hoke v. Henderson, 3 Devereux, 12-14; Kissam v. Edmundson, 1 Iredell's Equity, 180; Sexton v. Wheaton, 1 American Leading Cases, 45; Norton v. Norton, 5 Cushing, 529; O'Daniel v. Crawford, 4 Devereux, 197-204; Reade v. Livingston, 3 Johnson's Chancery, 481-499; Townshend v. Windham, 2 Vesey, 10; Jenkyn v. Vaughan, 3 Drewry, 419-424.

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2. The ordinance adopted as part of the State constitution, by the people of Missouri, July 4th, 1865, levying a tax on the gross receipts of the company, within two years after it was completed and put in operation, in order to pay debts of the State, contracted in order to help to build the road (and which the railroad company was, as between itself and the State, primarily bound to pay) impaired the obligation of the contract, and was void.

ERROR to the Supreme Court of Missouri, the question involved having been the right of a tax-collector of the State of Missouri to levy a tax authorized by an ordinance of the State named, on the property of the Pacific Railroad Company, a corporation incorporated by the said State. The case was thus:

By an act of March 12th, 1849, the railroad company was incorporated, as already mentioned, with a capital of \$10,000,000, for the purpose of building a railroad across the State, from the city of St. Louis, on the eastern line of the State, to a point indicated in the western line. Authority was given to the counties through which it should pass to subscribe for the stock, and it was invested also with the powers usually conferred upon such companies.

By an act passed February 22d, 1851, it was enacted that when a certain sum had been collected of the capital stock and expended in the survey and construction of the road, the bonds of the State to the same amount should be lent to the road, and further loans were authorized, not to exceed \$2,000,000. The loan was made a lien on the road, and the company was required to pay the principal and interest of the bonds.

By an act of December 25th, 1852, certain public lands were vested in the company, and the company were authorized to build a southwestern *branch* road to the western boundary of the State. Provision was made for the issue of an additional \$1,000,000 of the bonds of the State, to be used in aid of the work proposed, with precaution that subscriptions should have been made and should previously have been applied by the company to amounts stated, and that the bonds should not be sold at less than their par value,

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and that the road should be completed and put in operation within five years after the passage of the act. The companies were to pay the principal and interest of these bonds also, and the State had its lien.

The twelfth section contained the following provision :

"The said Pacific Railroad and the said Southwestern Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of such completed road, at the cash value thereof, shall be subject to taxation at the rate assessed by the State on other real and personal property of like value. . . . *Provided*, that if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, then the said company shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties in this section imposed."

This act and its grants were duly accepted by the company, in a mode which the act prescribed, in case the company desired to accept it.

This constituted one ground relied on, in connection with certain other matters, by the company. Now, as to another ground relied on by them, in connection with the same certain other matters, as ground independent of that already stated.

With the outbreak of the rebellion, in 1861, both the railroad company and the State made default in the payment of the interest on the State bonds, and on the 10th of February, 1864, the westernmost sixty-five miles of the road being yet unfinished, the legislature passed an act authorizing the company to issue its bonds for \$1,500,000 and to mortgage that unfinished part; the State agreeing to relinquish for this object and to this extent her first lien, and retaining only a second one.

The bonds when issued were to be delivered to a fund commissioner, created by the act, and to be sold by him,

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and the money arising from such sale was to be applied by him to the construction and equipment of the road. The act also required all the gross earnings of the road to be paid to said fund commissioner, and that he should, after paying the running expenses of the road and his salary, apply the residue, first to the extension and equipment of the road until it was completed, after reserving sufficient for the payment of the interest accruing semi-annually on the bonds sold; secondly, to the purchase or payment of the bonds; third, to the payment of the interest on certain other bonds authorized by the act, which were never issued; fourth, to the payment of dividends on certain preferred stock, also authorized by the act, which was never issued; the surplus, if any, to the purchase of State bonds with the interest coupons.

This act was duly accepted by the company. The fund commissioner was appointed, the mortgage executed, the bonds issued by the company and sold by the fund commissioner, and the money arising from such sales and from the earnings of the road was applied by him in the manner provided in the act.

The fund commissioner continued in the discharge of the duties imposed by the act until October, 1868, when his office was abolished, the bonds being at that time still unpaid.

On the 4th day of July, 1865, the present constitution of Missouri, together with an ordinance known as the Railroad Ordinance as a part thereof, went into effect. The provisions of the ordinance are as follows:

* "SECTION 1. There shall be levied and collected from the *Pacific Railroad Company*, the *North Missouri Railroad Company*, and the *St. Louis and Iron Mountain Railroad Company*, an annual *tax* of ten per centum of all their gross receipts for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States), from the 1st of October, 1866, to the 1st of October, 1868, and fifteen per centum thereafter; which *tax* shall be assessed and collected in

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the county of St. Louis, in the same manner as *other State taxes* are assessed and collected, *and shall be appropriated by the General Assembly to the payment of the principal and interest now due or hereafter to become due, upon the bonds of the State, and the bonds guaranteed by the State, issued to the aforesaid railroad companies.*

"The *tax* in this ordinance specified shall be collected from each company hereinbefore named only for the payment of the principal and interest on the bonds for the payment of which such company shall be liable; and whenever such bonds and interest shall have been fully paid, no further tax shall be collected from such company, but nothing shall be received by the State in discharge of any amounts due upon said bonds except cash or other bonds or obligations of this State.

"Should either of said companies refuse or neglect to pay said *tax*, as herein required, and the interest or principal of any of said bonds, or any part thereof, remain due and unpaid, the General Assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall be thus in default, under the lien reserved to the State, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company."

At the time of the passage of this ordinance the road was under construction, and it was not completed and put in operation until the 1st of April, 1866. It was then completed and put in operation.

In pursuance of the ordinance above quoted, one Maguire, a collector of taxes for the State of Missouri, assessed a tax against the company for the year beginning October 1st, 1866, at 10 per cent. on \$2,536,440, that being the gross earnings of the road for that year.

The tax was assessed in the same manner as other State taxes were assessed in said county, 10 per cent. as a tax under the ordinance just above recited, amounting to the sum of \$253,644. *No dividend had been declared or paid when the levy in question was made, and two years had not elapsed from the completion of the road.*

The company refused to pay the tax and Maguire seized its property. The company sued him for a trespass. He justified under the ordinance.

Positions of the company.—Positions of the collector.

A case setting forth the facts above given was agreed on and stated, for the judgment of the court, and on it the company contended that the ordinance was unconstitutional so far as it affected them, because it was a law passed by the State "impairing the obligation of contracts," and because it deprived the company of its property without due process of law.

It was agreed that if the court adjudged the ordinance invalid it should give judgment in favor of the company for six cents damages and costs, and if valid give judgment against it for costs only. The Supreme Court of Missouri adjudged the ordinance valid, and the company brought the case here.

Messrs. W. M. Ecarts, J. Baker, and J. B. Henderson, for the company, plaintiff in error, placed the case on the following among other grounds:

1. That by the twelfth section of the act of December 25th, 1852, the company was exempted from the payment of the tax in question.

2. That by the act of February 10th, 1864, the entire earnings of the road were appropriated to other purposes, wholly inconsistent with the payment of the tax in question, and that they were actually paid to the agent of the State as therein required, and by him paid out under the authority of the said act.

Messrs. Montgomery Blair and F. A. Dick, with whom was Mr. A. H. Buckner, contra, contended:

1. That the twelfth section of the act of 25th December, 1852, referred to tax for general purposes, and applied only to tax on the corporate property, road-bed, machinery, buildings, &c.; and that the act would not prevent a tax on the franchise or on the earnings of the company.

2. That the ordinance did not impose a tax, since it merely applied the income of the company to the payment of debts which were alike debts of the State and of the company.

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Mr. Justice HUNT delivered the opinion of the court.

The first question is this: By the acts organizing this company, and by the acts loaning the credit of the State and the proceedings under the same, was an agreement created on the part of the State that the Pacific road should not be taxed until it was built and finished and had declared a dividend, and that for two years after it was finished it should be liable to taxation only in common with other property of the State and at the same rate?

The right of taxation is a sovereign right, and presumptively belongs to the State in regard to every species of property and to an unlimited extent. The right may be waived in particular instances, but this can only be done by a clear expression of the legislative will. The cases of *Tomlinson v. Branch*,* and *Tomlinson v. Jessup*,† in this court, and many others referred to in those cases, show that when a contract of exemption from taxation is thus established it is binding upon the State, and the action of the State in the passage of laws violating its terms will not be sustained.‡ The principles of law are sufficiently settled. The real question arises upon their application to the facts of the case.

Upon the facts presented by the agreed case before us we are of the opinion—

1st. That the twelfth section of the act of 1852 created a contract between the State and the railroad company, by which the railroad was exempt from taxation until it was completed and put in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years after its completion.

2d. That the ordinance of 1865, imposing a tax of ten per cent. upon its gross earnings before the road was completed and in operation, and had declared a dividend, was a violation of this contract, and that the levy for its enforcement was illegal.

We omit a reference to other questions which have been

* 15 Wallace, 469.

† Ib. 454.

‡ *Osborne v. Mobile*, 16 Id. 481; *Humphrey v. Pegues*, Ib. 247, where the cases are collected.

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argued and express no opinion upon them. We base our opinion upon the effect of the statutes already cited.

The authorities which have been referred to show that a State legislature may make a contract to exempt a corporation from taxation by which it will be bound.

That the facts recited constitute such an agreement we think sufficiently plain. The Pacific corporation was unable to raise funds for completing its road. To induce it to go on with its work and to induce individuals and counties to subscribe for what the legislature evidently deemed an enterprise of public benefit, it made loans of the credit of the State from time to time. To make the franchise still more valuable to the company, and to the end that individuals and counties should be induced to subscribe to the stock, the legislature added an exemption from taxation until the road should be completed and in operation, and should have declared a dividend. That the money value of this exemption was great is evident from the fact that the tax imposed for a single year, commencing October 1st, 1866, amounted to \$253,644.

This transaction amounted to a contract between the State and the corporation that there should be no taxation of the company until the occurrence of the stipulated events.* In delivering the opinion in *The Wilmington Railroad v. Reid*,† Mr. Justice Davis says: "It has been so often decided by this court that a charter of incorporation granted by a State creates a contract between the State and the corporators, which the State cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. . . . If the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests."

* *Humphrey v. Pegues*, 16 Wallace, 244; *Wilmington Railroad v. Reid*, 13 Id. 264.

† 13 Wallace, 266.

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The statute of 1852 provided for an exemption from taxation of the "Pacific Railroad," its bed, and of its "buildings, machinery, engines, cars, and other property." The tax imposed by the ordinance of 1865 was an "annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers." It was directed "to be levied and collected from the Pacific Railroad." In *The Wilmington Railroad v. Reid*,* it was held that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also. In the case before us the road-bed, buildings, machinery, cars, and other property not only, but the "Pacific Railroad" is declared to be exempt from taxation. We cannot doubt that a contract not to tax a railroad company or its property is broken by the levy of a tax upon its gross receipts for the transportation of freight and passengers.

A suggestion is made that the imposition in question is not a tax, for the reason that the ordinance imposing it provides that the same shall be appropriated by the General Assembly in payment of the principal and interest due and to become due upon the bonds issued to the company by the State. The purpose to which the State shall apply the proceeds of a tax is not material so long as it is a public purpose, and that the payment of the debts of a State is a public purpose does not admit of doubt. It is called a tax both in the agreed statement of facts before us and in the ordinance imposing it. Thus, "there shall be levied and collected an annual tax of ten per centum of all their gross receipts," &c., "which tax shall be assessed and collected in the county of St. Louis in the same manner as other State taxes are assessed and collected." "The tax in this ordinance specified shall be collected from each company," &c. . . . "Should either of said companies refuse or neglect to pay said tax as herein required," &c. A tax upon receipts

* 13 Wallace, 264.

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is one of the recognized modes of taxing corporations, as well under State laws as under the laws of the General Government.

The ordinance of 1852 was either the imposition of a tax or it was an act of high-handed violence, a forcible seizure of private property, without law or authority, an act which, if committed by an individual, would amount to robbery. The case before us will justify no such imputation upon the State of Missouri.

The result of these views is the REVERSAL OF THE JUDGMENT below, and in accordance with the stipulation in the record, judgment is ordered in favor of the plaintiff in error for six cents damages and for costs, and the case is remanded, with directions that a judgment be entered accordingly.

The CHIEF JUSTICE: I concur in the judgment of the court which has just been announced, but not for the reasons assigned. If the assessment complained of is a tax, then I agree with the majority of the court in the opinion that it is a violation of the twelfth section of the act of December 25th, 1852, and void. I think, however, it is not a tax, but an exaction of the payment of the debt due from the railroad company to the State, and as such inconsistent with the provisions of the act of February 10th, 1864, which, upon its acceptance by the company, became a contract between the parties and binding upon each.

Justices CLIFFORD and MILLER dissented from the opinion of the court, because the act of the legislature referred to did not, in their judgment, exempt the company from the tax imposed by the ordinance.

Mr. Justice STRONG did not sit in the case.